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80-1905

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTONIO ESCARIZ, a former incompetent person,

Petitioner,

—against—

HYMAN S. BARAHAL, M.D., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JONATHAN A. WEISS
EDGAR PAUK
LEGAL SERVICES FOR THE ELDERLY
132 West 43rd Street, 3rd Fl.
New York, New York 10036
(212) 391-0120

BRUCE J. ENNIS
E. RICHARD LARSON
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street, 8th Fl.
New York, New York 10036
(212) 944-9800

Attorneys for Petitioner

QUESTIONS PRESENTED

Where petitioner, an allegedly mentally ill but nondangerous person, was civilly committed to a state hospital and kept there for six years against his will receiving little more than custodial care; and where all his assets were dissipated to pay the hospital by a committee whose ex parte appointment for the sole purpose of facilitating payment to the hospital was later found by the District Court in this case* to be illegal, unconstitutional and void ab initio:

I

Did the taking of petitioner's assets by the Hospital constitute an unconstitutional deprivation of property without due process of law?

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* The caption of the case in this Court, set forth in full at p.1 of this petition, contains the names of all parties to the proceeding in the Court of Appeals for the Second Circuit.

II

Did the Court of Appeals for the Second Circuit's holding that petitioner was liable for the costs of his institutionalization conflict with this Court's decision in O'Connor v. Donaldson, 422 U.S. 563, which held that a nondangerous person capable of living without institutionalization had the right to be free?

III

Did the Court of Appeals for the Second Circuit correctly decide the important federal issue, not previously settled by this Court, of whether an award of attorneys' fees under the Civil Rights Attorneys Fees Award Act of 1976 should be based on the actual hours spent to prevail, calculated at prevailing rates, rather than an arbitrary smaller amount based on the fact that the case allegedly vindicated the right of only one person?

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Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977)

Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)

In Re Coates, 9 N.Y. 2d 242 (1961)

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Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988

McKinney's 1968 Session Laws of New York, Ch. 1050 § 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

ANTONIO ESCARIZ, a former incompetent person,

Petitioner,

- against -

HYMAN S. BARAHAL, M.D., individually and as Acting Director of Pilgrim State Hospital for the periods of December 4, 1958, to April 28, 1964, and August 1, 1966, to August 1, 1968; HENRY BRILL, M.D. individually and as Director of Pilgrim State Hospital for the periods of April 28, 1964, to August 1, 1966, and August 1, 1968, to the present; The Estate of PAUL H. HOCH, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene for the period of July 7, 1955, to December 15, 1964; AURORA ESCARIZ MAGAN, individually and as committee of the person and property of Antonio Escariz for the period of May 23, 1963, to September 5, 1969; ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene for the period of February 3, 1966, to the present; CHRISTOPHER F. TERRENCE, M.D., individually and as Acting Commissioner of the New York State Department of Mental Hygiene for the period of December 15, 1964, to February 3, 1966,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Antonio Escariz ("Mr. Escariz") prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on December 18, 1980.

Opinions Below

The order of the Court of Appeals for the Second Circuit has not yet been officially reported and is set forth at Appendix A herein. The opinion of the District Court for the Eastern District of New York, dated August 4, 1980, is not reported and is set forth at Appendix B herein. A prior opinion by the District Court for the Eastern District of New York, dated October 16, 1979, which was not appealed from, but is material to this petition for a writ of certiorari, is set forth at Appendix C herein.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was dated and entered on December 18, 1980. Petitioner filed a timely motion for rehearing in banc, which was denied on February 9, 1981 in an order set forth at Appendix D herein. This petition for a writ of certiorari was filed within ninety days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statement of the Case

In November 1962, while out to buy a newspaper, Mr. Escariz, a retired electrician born in Spain, was arrested on vagrancy charges and ordered committed to a county hospital for examination as to sanity. On petition of the county hospital and after a hearing at which he was present but not represented by

counsel, Mr. Escariz was ordered admitted to the jurisdiction of the New York State Department of Mental Hygiene (the "Department") for the purpose of "observation and treatment for a period not exceeding 60 days."

Before the expiration of the 60 days, the Department filed with the County Clerk a form certifying that Mr. Escariz was "mentally ill" and "in need of continued care and treatment." Solely on the basis of this ex parte filing, of which Mr. Escariz was given no notice, the temporary admission order became a final order of indefinite commitment to Pilgrim State Hospital (the "State Hospital").

During April-May, 1963 the State Hospital, upon discovering that Mr. Escariz was not destitute, but received pension payments, petitioned for, and obtained from the State Court an order declaring

petitioner incompetent and appointing a committee to manage his property. As later found by the District Court in this case, the sole purpose behind the petition was to facilitate the payment to the State Hospital of their bills (A-18). The declaration of incompetency and the appointment of the committee were accomplished ex parte, and entirely without notice to Mr. Escariz.

Petitioner remained confined against his will in the State Hospital for the next six years without any hearings being held as to his sanity. No individualized plan of treatment was ever developed or suggested for him and the treatment allegedly provided was, at best, sporadic and ineffectual.*

* The State Hospital record makes clear how very minimal were the medical services rendered to Mr. Escariz. They indicate that during his six years' stay Mr. Escariz was occasionally given medication, received a few medical tests, most of these upon admission, attended (footnote continued on following page)

During his six-year involuntary commitment Mr. Escariz was not afforded any periodic retention hearings, as the New York Mental Hygiene Law then in effect did not require any. In 1968, however, the law was changed and retention hearings for patients who, like Mr. Escariz, were committed prior to September 1, 1965, were mandated no later than April 1, 1969. (McKinney's 1968 Session Laws of New York, Chapter 1050, § 3). Pursuant to the new law, in March of 1969 Mr. Escariz was notified that the State Hospital would apply for the first time for authorization to continue his involuntary commitment on the ground that he was "unimproved."

(footnote continued from preceding page)
thirteen group therapy sessions and received the attention of psychiatric personnel some 20 times, for an average of 3.75 times per year. (A summary of the complete record of treatment afforded Mr. Escariz is annexed hereto as Appendix E).

And, for the first time, he was advised of his right to a hearing and to counsel. He availed himself of these rights. One month later, after he had retained counsel but before any hearing could take place, he was discharged without any determination by the State Hospital that he was cured, improved or had never been ill. The strong implication to be drawn from this sequence of events is that concern for the upcoming court challenge played a considerable, if not decisive, part in Mr. Escariz' discharge.

In 1973, after his release, Mr. Escariz began this action to have the appointment of his committee declared void and to obtain restitution of all moneys paid out by his committee.*

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* This action was initiated as a class action, but that status was denied to petitioner by an order not appealed and thus not at issue herein.

By a Memorandum of Decision and Order dated October 16, 1979 (A-17), the District Court held the appointment of petitioner's committee void ab initio and awarded Mr. Escariz $4,842.95 plus interest, the amount stipulated by the parties as the damages attributable to commissions, fees and other expenses related to the operation of the committee.

In a subsequent Memorandum of Decision and Order dated August 4, 1980, the District Court held that the sum of $21,329, which had been paid by petitioner's former committee to the Hospital, was not reimbursable to petitioner because that amount was owed to the State Hospital in connection with petitioner's six year hospitalization. The District Court also held that petitioner was entitled to an award of "reasonable" attorneys fees in the amount of $8,200.

REASONS FOR GRANTING THE WRIT

I

PETITIONER, WHO WAS UNCONSTITUTIONALLY COMMITTED, DECLARED INCOMPETENT AND KEPT AGAINST HIS WILL FOR SIX YEARS BY A STATE HOSPITAL, IS NOT LIABLE TO THE HOSPITAL FOR THE ALLEGED COSTS OF HIS STAY.

Mr. Escariz' experience involves one of the most extreme deprivations of constitutional rights, a six-year deprivation of liberty without any due process of law. In 1963 he was committed indefinitely and against his will to a state hospital* on the ground that he was "mentally ill" and "in need of care and treatment," without any hearings or representation of counsel.

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* Although this case was formally brought against five individuals in their individual and official capacities, the State of New York is the real respondent and has agreed to assume all financial liability.

While he was confined against his will, the State Hospital obtained a declaration of incompetency whose "sole purpose ... was to facilitate the payment to the Hospital of amounts allegedly owed for services and treatment rendered to plaintiff" (A-18). The State Hospital then continued to retain petitioner for six years and presumably would have continued to do so to date were it not for the fact that the New York Mental Hygiene Law was changed to provide for retention hearings no later than April 1, 1969 for patients who, like Mr. Escariz, were committed prior to September 1, 1965. (McKinney's 1968 Session Laws of N.Y., Ch. 1050, §3). As soon as the petitioner was informed of his right to a hearing and to counsel, he availed himself of those rights and was freed on April 16, 1969, before any

hearing could take place and despite being considered "unimproved" by the State Hospital.

The order of indefinite commitment was obtained by the State Hospital entirely without notice to Mr. Escariz, even though two years earlier the New York Court of Appeals read into the relevant New York Mental Hygiene Law the requirement of notice and the right to a jury trial on the issue of sanity. In re Coates, 9 N.Y.2d 242 (1961). The declaration of incompetency and the appointment of Mr. Escariz' committee were also obtained in an entirely ex parte manner by the State Hospital, and have been since held to be void ab initio by the District Court.

The State Hospital, nevertheless, has profited and continues to profit from the unconstitutional deprivation of Mr. Escariz' liberty which it engineered.

The amount involved is $21,329, which Mr. Escariz' former committee paid out to the State Hospital allegedly on his behalf to cover the costs of the unconstitutional confinement. Quite apart from the self-evident legal principle that an unconstitutional deprivation can generate no liability in its victim, a committee whose appointment is declared void ab initio can generate no liability in the person on whose alleged behalf it acted.*

If matters are allowed to stand and the writ is not granted, the result will be that the State Hospital will be allowed to profit from the unconstitutional deprivations it visited on Mr. Escariz,

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* Even if Mr. Escariz had received anything of value from the State Hospital, and he did not, the burden is on the Hospital to prove it, by suing Mr. Escariz in quantum meruit, a lawsuit Mr. Escariz would welcome because of its obvious counterclaims.

thus compounding an unconstitutional deprivation of liberty with a deprivation of property without due process of law, reducing his constitutional rights to empty words.

II

THE COURT OF APPEALS' HOLDING CONFLICTS WITH THIS COURT'S DECISION IN O'CONNOR V. DONALDSON.

The record of Mr. Escariz' treatment, as summarized at A-30 to 33, clearly shows that over the six years of his involuntary commitment he received either no treatment or not even minimally adequate treatment, as the State Hospital did not conceive of, or attempt to develop a plan of treatment for him. Such a plan has been held to be an essential element of minimally adequate treatment Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). It is fair

to conclude, therefore, that what Mr. Escariz received was little more than "custodial care" at best. Since Mr. Escariz was considered "unimproved" upon his release in 1969 and capable of living without institutionalization, it follows that he would also have been capable of living free at the time of his indefinite commitment in 1963. At the very least, the Hospital has not met the burden of proving otherwise, as no hearings were ever held on the issue because of the Hospital's violation of Mr. Escariz' constitutional rights.

Under the holding of this Court in O'Connor v. Donaldson ("O'Connor"), 422 U.S. 563 (1975), an individual receiving only custodial care, but capable of living safely without institutionalization, has the right to be free. It follows that if

that individual's right to be free is violated, at the very least he should not be liable for the alleged value of services imposed on him against his will during his unconstitutional confinement. The Court of Appeals for the Second Circuit's affirmance of the District Court's finding of such liability conflicts with this Court's decision in O'Connor.

III

THIS COURT SHOULD SETTLE THE ISSUE OF WHAT METHOD SHOULD BE USED IN CALCULATING THE AMOUNT OF ATTORNEYS FEES TO BE AWARDED UNDER THE CIVIL RIGHTS ATTORNEYS FEES AWARD ACT OF 1976

The Court of Appeals correctly held that petitioner is entitled to an award of reasonable attorneys fees under the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. §1988, as amended (the

"Attorneys Fees Act"), for prevailing on the issue of the unconstitutionality of petitioner's committee. Yet, although both the amount of hours expended by petitioner's attorneys and their hourly rates of compensation were uncontested, petitioner was awarded only $8,200 of the $39,368.75 requested for attorneys fees.

The District Court did not explain the method used in arriving at that figure, but it listed, inter alia, the following factors as determining the amount of its award:

1. "The case vindicated the right of only one person" (A- 12);

2. "While the issue was one of constitutional magnitude, the questions presented themselves in a rather simple light" (A-12);

3. Petitioner's motion "culminated

in a summary judgment which was granted by the court because it was 'nearly identical' to the case of Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971), 486 F.2d 76 (2d Cir. 1973), cert. denied, 419 U.S. 826 (1976)." (A-12 to 13).

On the basis of the above criteria, the District Court reduced attorneys fees in this case to less than 20% of the amount obtained by multiplying the actual number of hours expended times the attorneys' regular rates. This action frustrates both the letter and intent of the Attorneys Fees Act, because it deprives petitioner of the opportunity to recover the costs of vindicating his rights. It is also highly unfair because those costs depend not on the "simplicity" of an issue or on the number of plaintiffs, but on the stubborness of the opponent.

The issue of how the amount of attorneys fees should be calculated under the Attorneys Fees Act is an important federal question with far-reaching consequences for all civil rights litigants and should be settled by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: May 8, 1981

Respectfully submitted,

JONATHAN A. WEISS
EDGAR PAUK
LEGAL SERVICES FOR THE ELDERLY
132 West 43rd St., 3rd Fl.
New York, New York 10036
(212) 391-0120

BRUCE J. ENNIS
E. RICHARD LARSON
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd St., 8th Fl.
New York, New York 10036
(212) 944-9800

Attorneys for Petitioner

APPENDICES

APPENDIX A A-1

Order of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18 day of December one thousand nine hundred and eighty.

Present: Hon. Sterry R. Waterman
Hon. William H. Mulligan
Hon. Ellsworth A. Van Graafeiland

Circuit Judges,*
80-7695

ANTONIO ESCARIZ, a former incompetent person,

Appellant,

-against-

HYMAN S. BARAHAL, M. D., et al.

Respondents.

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* N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed substantially on the opinion below of the Hon. Mark A. Costantino, 73 C 1454 (E.D.N.Y., Aug. 4, 1980).

/s/
Sterry R. Waterman

/s/
William H. Mulligan

/s/
Ellsworth A. Van Graafeiland

(Filed: December 18, 1980)

Opinion of the District Court for the Eastern District of New York, Dated August 4, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
ANTONIO ESCARIZ, a former incompetent person,
Plaintiff,
-against-
HYMAN S. BARAHAL, M.D., et al.,
Defendants.
----------X

73 C 1454

MEMORANDUM OF DECISION AND ORDER
AUG 4 1980

COSTANTINO, D. J.

This court filed a Memorandum of Decision and Order on October 16, 1979 in which it found that the declaration of incompetency of plaintiff, Antonio Escariz, and the appointment of a committee were obtained in a manner violative of the United States Constitution. The decision left remaining the question of damages relative to the operation of plaintiffs' committee, the reasonable

value of the treatment afforded plaintiff at Pilgrim State Hospital, and the awarding of reasonable attorneys' fees.

This court declared the appointment of a committee to manage plaintiff's personal and business affairs void ab initio. In so doing, it was held that plaintiff was entitled to recover the damages attributable to fees and other expenses relating to the operation of the committee. See generally Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971), 486 F.2d 76 (2d Cir. 1973), cert. denied, 419 U.S. 826 (1974). The parties have stipulated that damages to plaintiff amounted to $4,842.95 plus interest from the date those funds were taken. In order to determine the appropriate amount of interest, the parties have agreed that the sum of $4,842.95 was taken from plaintiff's account in the amounts and

as of the last date of each month as appears in Exhibit A annexed hereto. The Clerk of the Court is directed to determine the final sum owing to plaintiff by combining the stipulated amount with the sum derived from the legal interest rates prevailing at the first day of the month following each of the payments made from plaintiff's assets.

Plaintiff also sought the return of money paid by his committee to the Department of Mental Hygiene for services rendered in connection with the treatment plaintiff received at Pilgrim State Hospital. In its Memorandum, the court stated that it would be unable to look into the propriety of such charges initially approved in a state accounting proceeding, if plaintiff had an existing right to challenge the charges in a state proceeding brought under New York Mental

Hygiene Law §43.11. See Dale v. Hahn. 486 F.2d 76, 80 (2d Cir. 1973), cert. denied, 419 U.S. 826 (1974). The decision of this court dated October 19, 1979 stated that "no state forum for challenging the Department of Mental Hygiene's charges existed for the plaintiff in Dale or exist for the plaintiff here." See Dale v. Hahn, No. 69 Civ. 3531 (S.D.N.Y. January 19, 1977) (Knapp, J.) and Plaintiff's Trial Memorandum filed July 21, 1978, at 10-12, and supporting documents.

Thus, this court found that it had the power to review the propriety of the Department of Mental Hygiene's charges to plaintiff. Specifically, the court limited its inquiry by the scope of New York Mental Hygiene Law, §43.11 (McKinney 1972) which affords a right of action to a patient who alleges an overcharge or

to a patient who alleges that services were not forthcoming. Thus, the question before the court focuses on the narrow issue of the reasonable value of the services rendered.

Plaintiff alludes to the unconstitutional nature of New York Mental Hygiene Law, §43.01(a) which mandates that mental patients who are civilly committed to a state hospital must pay the cost of their treatment. It is well established, however, that a court should not pass on questions of constitutionality, unless such adjudication is unavoidable. Ulster County Court v. Allen, 47 U.S.L.W. 4618, 4622 (June 4, 1979); New York City Transit Authority v. Beazer, 47 U.S.L.W. 4291, 4295 (March 25, 1979). Here, plaintiff attacked the declaration of incompetency and the appointment of his committee on the ground, inter alia, that he did not

receive adequate notice of the proceedings adjudicating him incompetent. The constitutionality of New York's Mental Hygiene Law, §43.01(a), was never directly challenged. This court, therefore, will not pass upon the constitutionality of the New York State law which charges mental patients for services they allegedly do not seek.

In rendering its decision on the reasonable value of the treatment afforded plaintiff at Pilgrim State Hospital, the court had before it the benefit of all relevant hospital records and the oral presentation of counsel. Indeed, with regard to the outstanding damage question, the parties agreed that there was no further evidence to adduce and that the court must resolve the matter on the basis of the record. The court was supplied with a rate schedule setting

forth the rates charged all admittees receiving care and treatment in health institutions operated by the Department of Mental Hygiene. Those rates represent a per diem charge to patients of state mental institutions.

Here, plaintiff, Escariz, was hospitalized for six years. The records from Pilgrim State Hospital indicate that plaintiff was in need of and received (a) extensive medication for physical and psychological ailments, including epilepsy, alcoholic cirrhosis and schizophrenia; (b) the constant attention of medical and psychiatric personnel; and (c) a multiplicity of medical and psychiatric tests. Further, on or about November 24, 1969, a thorough accounting and examination of plaintiff's expenses were made.

An examination of all of the records before the court indicates that plaintiff,

at the time of his admittance to Pilgrim State Hospital, was a man in need of medical and psychological assistance. The charges amounting to $21,329 represented the final charge over a six year period at a flat per diem rate calculated by the Department of Mental Hygiene for patients generally admitted to Pilgrim State Hospital. The hospital records convince this court that plaintiff received extensive and sorely needed treatment and the rates reflected the fair and reasonable value of that treatment. This court therefore concludes that $23,329 was properly payable to the Department of Mental Hygiene in connection with plaintiff's hospitalization.

The final issue before the court concerns the awarding of attorneys' fees. A successful civil rights plaintiff should ordinarily recover attorneys'

fees unless special circumstances would render an award unjust. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Beazer v. New York City Transit Authority, 558 F.2d 97 (2d Cir. 1977), rev'd on other grounds, 47 U.S.L.W. 4291 (March 21, 1979); Boe v. Colello, 447 F. Supp. 607 (S.D.N.Y. 1978). It is further established that a legal service organization qualifies for an attorneys fee award. Beazer v. New York City Transit Authority, 448 F.2d 97 (2d Cir. 1977), rev'd on other grounds, 47 U.S.L.W. 4291 (March 21, 1979). Accordingly, plaintiff is entitled to an award of reasonable attorney's fees.

In determining what award is reasonable, the court will examine the skill and professional standing of the lawyers involved, the novelty and difficulty of the questions at issue, the the degree of responsibility involved in

management of the cause, the time and labor required, the usual and customary charges in the community and the benefits resulting to the client. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Here, the court is aware of the fact that the case vindicated the right of only one person. Further, while the issue was one of constitutional magnitude, the questions presented themselves in a rather simple light. The legal issues were straight forward and were based upon well-established principles of constitutional law. The case did not require long hours of discussion in-court; it neither generated a voluminous record nor necessitated an unwieldy number of depositions. Plaintiff's motion culminated in a summary judgment which was granted by the court because it was "nearly identical" to the

case of Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971), 486 F.2d 76 (2d Cir. 1973), cert. denied, 419 U.S. 826 (1974). Thus, once Dale v. Hahn, supra, was decided, the hours of research needed in preparation for the summary judgment motion was narrowed significantly.

Finally, the court must award attorneys' fees based upon a reasonable hourly rate and upon an assessment of hours "reasonably" necessary to the prosecution of a successful claim. Lund v. Afleck, 587 F.2d 75 (1st Cir. 1978). Here, the court is aware of the fact that one of the principal attorneys, who initially represented the plaintiff, calculated his total time expended as 3 hours in-court and 37 hours out-of-court. The court also is cognizant of the fact that it is reasonable to

calculate in-court time at a higher rate than either out-of-court time or time expended on informal communications.

In light of the foregoing and the number of hours expended in-court, the court finds that an award of two thousand dollars to the New York Civil Liberties Union and an award of six thousand and two hundred dollars to the Legal Services for the Elderly Poor, are reasonable.

So Ordered.

/s/
U. S. D. J.

DATE OF PAYMENT		AMOUNT
(May 1963-Dec. 1965)		
September 1964	$ 56.28	
	350.00	
	150.00	
	9.90	$566.18
October 1964		$ 60.00
December 1964		$ 30.00
December 1965	$ 30.03	
	7.00	
	30.00	
	4.95	
	113.00	$184.98
(January 1966-Dec. 1967)		
June 1966	$ 150.00	
	477.21	
	333.63	$960.84
December 1967	70.00	
	9.59	
	226.00	$305.59
(January 1968-Dec. 1968)		
February 1968		$ 83.06
April 1968	$ 6.30	
	30.00	$ 36.30
August 1968	$ 316.05	
	185.00	
	246.43	$747.48

December 1968		$ 20.00
(January 1969-Sept. 1969)		
February 1969	$ 5.00	
	83.00	$ 88.00
March 1969	$ 6.20	
	5.00	$ 11.30 [sic]
Final Order, December, 1969		
December 1969	$990.22	
	600.00	
	150.00	
	9.00	$1,749.22
TOTAL		$4,842.95

Opinion of the District Court for the Eastern District of New York, dated October 16, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

ANTONIO ESCARIZ, a former incompetent person,

Plaintiff,

-against-

HYMAN S. BARAHAL, M.D. etc., et al.,

Defendants.
----------X

73 C 1454

MEMORANDUM OF DECISION AND ORDER

COSTANTINO, D.J.

This civil rights action comes before the court for trial on a stipulated set of facts. The court's jurisdiction is based on 28 U.S.C. §1343(3) and (4). While the facts giving rise to the action have been set forth in prior decisions of this court, they will be briefly restated here.

On January 4, 1963 plaintiff Antonio Escariz was involuntarily committed to

Pilgrim State Hospital ("Hospital") which is operated by the New York State Department of Mental Hygiene. On April 26, 1963 defendant Dr. Hyman S. Barahal, then Acting Director of the Hospital, petitioned the New York State Supreme Court, Kings County, pursuant to former Section 1374 of the N. Y. Civil Practice Act, for an order declaring plaintiff incompetent and appointing a committee to manage plaintiff's personal and business affairs. The sole purpose behind the petition was to facilitate the payment to the Hospital of amounts allegedly owed for services and treatment rendered to plaintiff.

By order dated May 23, 1963, plaintiff was declared incompetent and defendant Aurora Escariz Magan, plaintiff's sister, was appointed as his committee. Plaintiff remained as a

patient in the Hospital until June 7, 1969, when he was released. On September 5, 1969 he was adjudged competent to manage his person and property. On December 17, 1969 a state accounting proceeding was held in Supreme Court, Kings County, which settled the accounts of plaintiff's committee.

Plaintiff now claims that the declaration of incompetency and the appointment of his committee were obtained in a manner that violated his right to due process. Specifically, he contends that (1) he did not receive adequate notice of the petition or proceeding for a declaration of incompetence or of the appointment of a committee; (2) no independent guardian ad litem was appointed to represent his interests; (3) that he was denied the opportunity to retain counsel and to

appear and be heard in opposition to the petition; and (4) the finding of incompetence was made without a hearing, based solely on insufficient allegations in the petition. The relevant stipulated facts with respect to these claims are as follows.

If called to testify, plaintiff would testify that he was not served with any papers regarding a committee proceeding. Dr. Ceylon Parker, who signed an affidavit stating that he personally served plaintiff with a copy of the petition for an order to declare plaintiff incompetent and a notice of the motion for the appointment of a committee, would testify that he has no recollection of the matter. Hospital records indicate that plaintiff was "served with a legal paper, namely, a notice of a hearing in the matter of the

appointment of a committee. The paper was returned ... by the patient and forwarded to the main office for filing."[1] Exhibit C. This is the only evidence regarding the notice plaintiff received with respect to the committee proceeding.

The parties have also stipulated that no guardian ad litem was appointed to represent plaintiff's interests in connection with the committee. Nor is there evidence that plaintiff was advised of his right to retained or appointed counsel or a guardian ad litem in the proceeding.

The committee proceeding was conducted ex parte, without a hearing or submission of evidence. The court acted merely on the basis of the verified petition for the appointment of a committee filed by defendant Barahal.

The facts of this case are virtually identical to those in Dale v. Hahn, 440 F. 2d 633 (2d Cir. 1971), 486 F.2d 76 (2d Cir. 1973), cert. denied, 419 U.S. 826 (1974). There the Second Circuit affirmed the district court's finding that where an alleged incompetent was either served with no notice of pending committee-appointment proceedings, or was served in such a way where the meaning of the notice was not made clear to her, her right to due process was violated. As the Court of Appeals noted:

> The state was not serving notice on an ordinary party in a civil suit; on the contrary, it was dealing with a person committed to a state mental institution as an incompetent -- a fact necessarily known to the state in light of the very nature of the proceeding.

486 F.2d at 79. Under these circumstances, the court approved the district court's

finding that merely physical service of process did not constitute adequate notice. Compare Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978).

Since the facts in this case are nearly identical to those in Dale, this court must also conclude that plaintiff's right to due process in connection with the committee-appointment proceedings was violated. Assuming that plaintiff was actually served with notice of the proceedings, there is no evidence that he was apprised that substantial interests were at stake:

> the right to enter into legal relations, to control and dispose of property, to enter into contracts, and to sue and be sued -- in short, at stake were all the incidents of being a competent individual which are lost when one is declared to be incompetent.

Dale v. Hahn, supra, 440 F.2d at 636. On the contrary, what evidence there is shows that the notice given to plaintiff was perfunctory and inadequate. Under these circumstances the appointment of the committee must be deemed void ab initio.[2] That being so, Dale establishes that plaintiff is entitled to recover the damages attributable to commissions, fees, and other expenses related to the operation of plaintiff's committee. The parties have stipulated that that amount is $4,842.95.

As this court noted in its decision of March 3, 1978, plaintiff is also seeking the return of moneys paid by his committee to the Department of Mental Hygiene for services rendered in connection with the treatment plaintiff received at the Hospital.[3] In Dale, the Court of Appeals stated that the district

court could not look into the propriety of such charges since they had been approved in the state accounting proceeding, provided, however, that the plaintiff had an existing right to challenge the charges in a state proceeding brought under N.Y. Mental Hygiene Law §43.11. Id., 486 F.2d at 80. See also this court's decision of March 3, 1978 at 6-9. Events subsequent to the decision of the Court of Appeals have made clear that no state forum for challenging the Department of Mental Hygiene's charges existed for the plaintiff in Dale or exist for the plaintiff here. See Dale v. Hahn, No. 69 Civ. 3531 (S.D.N.Y. Jan. 19, 1977) (Knapp, J.) and Plaintiff's Trial Memorandum filed July 21, 1978, at 10-12, and supporting documents. Therefore, as was done in Dale, this court must provide a forum

for plaintiff to challenge those charges.

Accordingly, the Clerk of the court is directed to enter final judgment declaring the appointment of plaintiff's committee void ab initio and awarding plaintiff damages in the amount of $4,842.95 plus interest from the date those funds were taken from plaintiff's bank account.

The parties shall appear before the court on November 7, 1979 at 10:00 A.M. in order to establish a procedure for reviewing the propriety of the Department of Mental Hygiene's charges for services allegedly rendered to plaintiff,[4] and for determining on what dates funds were taken from plaintiff's bank account and paid to his committee.

So ordered.

/s/
U.S.D.J.

FOOTNOTES

1. This entry was made by Dr. Parker, who allegedly served plaintiff with the papers.

2. Having found that defendants failed to give plaintiff adequate notice of the committee-appointment proceedings, it need not address his other due process claims.

3. The parties have stipulated that the amount paid by plaintiff's committee in connection with his hospitalization was $21,329.

4. The court will have to determine what treatment was actually given to plaintiff, the reasonable value of that treatment, and whether and to what extent any labor performed by plaintiff should offset the amount reasonably charged for treatment. The resulting figure will be compared to the $21,329 actually collected from plaintiff to determine whether he suffered any damages in connection with his hospitalization charges.

Order of the Court of Appeals for the Second Circuit Denying Petition For Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of February, one thousand nine hundred and eighty-one.

80-7695

ANTONIO ESCARIZ, a former incompetent person
Plaintiff-Appellant,

v.

HYMAN S. BARAHAL, M. D., et al.,

Defendants-Appellees

(Filed February 9, 1981, A. Daniel Fusaro, Clerk)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the Plaintiff-Appellant, Antonio Escariz,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/_____
A. Daniel Fusaro
Clerk

Summary of Petitioner's Hospital Record

The medical evidence in the record to document the alleged care and treatment provided to Mr. Escariz by the Hospital consists of the following:

Statistical Data of Admission (Mentally Ill):

A one-page compilation of Mr. Escariz' vital statistics, showing a psychiatric classification of "schizophrenia Mixed type" and the following "Significant Disorders Not Implicit in the Psychiatric Classification": (1) Alcoholic peripheral neuropathy (2) alcoholic cirrhosis (3) Labile hypertension.

[Tests Upon Admission]

-A two-page Physical Examination outline, dated January 4, 1963;

-A Syphilis Examination of Blood: Nonreactive;

-X-ray reports on skull, heart and lungs;

-Electro-encephologram Report: Normal;

-Ward Admission Record

Clinical Notes (Handwritten)

Entries date from January 5, 1963 to June 7, 1969. They show that little or no medication was ever administered to Mr. Escariz, that he attended thirteen group-therapy sessions between October 1963 and July 1964 and that beginning in April 1964 he took part in occupational therapy by working in the Hospital's electric shop.

Consultation and Special Services:

Entries show that Mr. Escariz received X-rays on February 18, 1964, July 22, 1966, August 1, 1966, for chest pains.

Entries also show that Mr. Escariz was in need of extensive dental care in

May of 1969, but that because "he will have to leave the hospital in few days only emergency can be taken care of."

Prescription Record: The Prescription Record shows that Mr. Escariz was administered Dilantin and Luminol in January and February 1963; and on one occasion Thorazin; Aspirin and Luminol in February and March 1964; an expectorant in July 1966 and salycic acid for a palm lesion in April-May 1967.

Medication Charts: The Medication Charts in the Record reflect the daily administration of medicine to Mr. Escariz in January and February 1963 and in April 1964.

Clinical Notes:

These typewritten psychiatric notes are dated from January 4, 1963 to June 7, 1969. Beginning on February 20, 1963,

approximately the date of Mr. Escariz' final commitment, they are all written by a Dr. Parker, under whose care Mr. Escariz remained until his discharge on June 7, 1969. There are twenty entries during that period of 75 months which appear to reflect psychiatric observations of Mr. Escariz by Dr. Parker.